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April 3, 2009

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554

Re: *Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160 in Rhode Island, WC Docket No. 08-24; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area, WC Docket No. 08-49*

Dear Ms. Dortch:

On March 26, 2009, a group of eleven competitive carriers, including each of the signatories to this *ex parte* letter, submitted for the Commission's consideration in the above-captioned dockets a proposed standard to govern requests for forbearance from Section 251(c)(3) unbundling obligations.[1] This proposed standard reflects the signatories' recognition that there are ways that the forbearance standard employed in past dockets could be modified to better meet the objectives of Section 10[2] and to respond to concerns regarding its lack of clarity, including those raised by commissioners. The signatories are confident that this proposed standard properly assesses the Section 10 requirement that there be sufficient facilities-based competition in any product market to ensure sustainable competition if forbearance from unbundling obligations is granted.

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1 Letter from Andrew D. Lipman, *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 08-24, 08-49 (filed Mar. 26, 2009).

2 47 U.S.C. § 160.

As shown herein, application of the proposed standard leads unquestionably to the conclusion that Verizon's Rhode Island and Virginia Beach petitions must be denied. Should the Commission choose to apply the framework it has previously employed to guide its Section 251(c)(3) forbearance analysis, however, this letter addresses how Verizon's petitions fail to satisfy that standard. The letter also discusses the myriad procedural defects of the petitions which support summary dismissal or denial for failure to meet the mandates of the Administrative Procedure Act ("APA"), the Commission's rules, and the statutory requirements of Section 10.

I. THE COMMISSION SHOULD ADOPT A SECTION 251(c)(3) FORBEARANCE STANDARD THAT MEASURES ACTUAL AND POTENTIAL COMPETITION FROM FACILITIES-BASED PROVIDERS IN EACH RELEVANT PRODUCT MARKET

The Commission's responsibility under Section 10 of the Act is to ensure that forbearance is not granted unless it first determines that continued enforcement of the regulation or statutory provision from which forbearance is sought is no longer necessary to protect consumers and competition from unjust and unreasonable or unjustly or unreasonably discriminatory charges and practices.[3] This critical responsibility consistently has been interpreted by the Commission and the courts to require a showing that a sufficient level of sustainable facilities-based competition exists in a particular product and geographic market before forbearance is granted.[4] As stated by the Commission in denying Verizon forbearance from Section 251(c)(3) obligations in the *6-MSA Order*:

> [T]he record evidence in this proceeding demonstrates that Verizon is not subject to a sufficient level of facilities-based competition in the 6 MSAs to grant relief under the Commission's *Qwest Omaha* and *ACS UNE* precedent, and we thus deny the Verizon Petitions with respect to the request for forbearance from UNE obligations [in] the 6 MSAs at issue in this proceeding.[5]

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3 47 U.S.C. § 160(a).

4 *See, e.g., Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005), ¶ 60 ("*Omaha Forbearance Order*"), *aff'd Qwest Corporation v. Federal Communications Commission*, 482 F.3d 471 (D.C. Cir. 2007).

5 *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd

The signatories maintain that the proposed forbearance standard outlined herein meets this actual competition requirement. Moreover, the proposed framework reflects the Commission's interest – consistent with Section 10 and prior Commission and court rulings – in ensuring that potential wholesale and retail competition be taken into account in assessing the overall state of the market for which forbearance is being sought. The proposed standard, which will be explained below, is as follows:

PROPOSED SECTION 251(c)(3) FORBEARANCE STANDARD

The Commission should determine separately for each product market for which forbearance is sought whether:

(1) There are at least two facilities-based non-ILEC wireline competitors in the wholesale loop market that each have deployed wholesale operations support systems sufficient to support wholesale demand in the relevant product market, each of which has actually deployed end-user connections to 75% of end user locations, and such wholesale suppliers individually have captured at least 15% wholesale loop market share in the relevant product market ("Wholesale Test"); or

(2) At least 75% of end user locations are served by two or more facilities-based non-ILEC wireline competitors that offer retail service in the relevant product market to the locations in question via loops that the competitors have actually deployed, and there are at least two facilities-based non-ILEC competitors that each have captured at least 15% retail market share in the relevant product market ("Retail Test").

A petition shall only be granted if either the Wholesale Test or the Retail Test is satisfied in a particular product market and the Commission shall forbear from enforcing the ILEC's Section 251(c)(3) unbundling obligation only in the product market in which the Wholesale Test or the Retail Test is satisfied.[6]

21293, ¶ 36 (2007), ("*Verizon 6-MSA Order*"), *appeal pending Verizon Telephone Companies v. Federal Communications Commission*, No. 08-1012 (D.C. Cir.).

6 Of course, in extraordinary circumstances the Commission may depart from this standard and reach a different conclusion as to whether forbearance from Section 251(c)(3) requirements is warranted.

A. The Commission Must Determine The Appropriate Product And Geographic Markets For Its Section 251(c)(3) Forbearance Analysis

The first step in the analysis of whether there is sufficient competition to warrant forbearance is the identification of the product and geographic markets upon which the Commission will base its assessment. It is absolutely critical that the Commission adopt appropriate product and geographic markets for its analysis.

1. Product Markets

The key to defining the relevant product markets is to identify the scope of services that are "adequate or feasible substitutes" for each other.[7] In its petition seeking forbearance in the Omaha MSA, Qwest proposed that the relevant product market is the market for services provided under Section 251(c) within the boundaries of the Omaha MSA. The Commission rejected Qwest's broad proposal, finding that "such a wide scope of services in the proposed definition to be unworkable as a single product market, especially because the services offered to mass market customers may not be adequate or feasible substitutes for services offered to business customers."[8] As the Commission has stated elsewhere, "A relevant market includes 'all products that consumers consider reasonably interchangeable for the same purposes.'"[9] Thus, services that differ materially in terms of service characteristics or price are properly categorized in separate product markets.

a. The Commission should examine wholesale inputs separately from retail services provided using those inputs and should treat inputs used to serve residential customers and the retail services actually provided to those customers separately from the inputs used to serve business customers and the retail services provided to business customers.

Application of the "substitutability" principle described above requires first that the Commission recognize the fundamental difference between the wholesale inputs used by carriers to create services and the retail services purchased by end-user customers. When applying the Wholesale Test, the Commission should examine the nature and extent of

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7 *Omaha Forbearance Order*, ¶ 21.

8 *Id.*

9 *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd 13967, ¶ 39 (2005). *See also Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd 21522, ¶ 71 (2004).

competition in the relevant markets for wholesale loop inputs. And when applying the Retail Test, the Commission should examine the relevant markets for retail services provided by carriers to customers using those wholesale inputs. In addition, importantly, the Commission should recognize the material differences in the services demanded by residential customers and the services required by even the smallest business customers. Thus, in applying the Wholesale Test, the wholesale inputs used to provide services to residential customers should be assessed separately from the wholesale inputs used to provide services to business customers. Similarly, when applying the Retail Test, the retail services provided to residential customers using unbundled network element ("UNE") loops and other wholesale inputs belong in a different product market from the retail services provided using UNE loops and other wholesale inputs to business customers.[10]

b. Cut-the-cord wireless lines should be excluded from the Commission's analysis for all product markets.

The Commission should rely solely on non-ILEC wireline competitors that have actually deployed their own loop facilities when conducting its competitive analysis. Cut-the-cord wireless lines are not properly included in the Commission's analysis for any product market. As Commissioner Copps noted in the *Verizon 6-MSA Order*, before cut-the-cord wireless customers can potentially be included in the Commission's market review, a "rigorous analysis" that addresses "important questions about what is the appropriate market, does wireless substitution act to constrain pricing, how do you account for the fact that wireless service is generally not a substitute in the business market, and what type of survey data is appropriate to be used" must be "sufficiently considered."[11] When each of these questions is properly taken into account, the conclusion is clear that cut-the-cord wireless lines have no place in the Commission's competitive analysis.

As a threshold matter, any attempt to include cut-the-cord wireless lines held by the ILEC's wireless affiliate must be rejected. Verizon improperly attempts to include cut-the-cord wireless lines held by Verizon Wireless customers as competitive lines for purposes of determining competition in the mass market in Providence and Virginia Beach.[12] Verizon acknowledges, however, that in the *Verizon 6-MSA Order*, the Commission explicitly rejected

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10 To be clear, any reference to the services provided to end user customers using UNE loops is exclusively for the purpose of defining the relevant product markets for the Commission's Section 251(c)(3) forbearance analysis. Competitors using UNE loops are not properly included in the Commission's analysis of competitive penetration by facilities-based (*i.e.*, competitive loop-based) carriers in the relevant product markets.

11 *Verizon 6-MSA Order*, Concurring Statement of Commissioner Michael J. Copps, at 1.

12 *Verizon Rhode Island Petition*, at 14-15; *Verizon Virginia Beach Petition*, at 14-15.

Verizon's bid to include Verizon Wireless lines on the competitive side of the ledger.[13] Indeed, the Commission's position on this issue is well-established. As noted in the *Verizon 6-MSA Order*, attributing Verizon Wireless' share of cut-the-cord wireless lines to Verizon "is consistent with [the Commission's] methodology in prior orders" and "is warranted because, as the Commission repeatedly has found, 'a wireline-affiliated [wireless] carrier would have an incentive to protect its wireline customer base from intermodal competition.'"[14] Verizon's attempt to count Verizon Wireless lines as competitive lines for purposes of quantifying facilities-based mass market competition constitutes an untimely request for reconsideration of the *Verizon 6-MSA Order* that should be rejected by the Commission.

Moreover, there is a sound basis to exclude all wireless lines from the calculation of competitive market penetration in both wholesale and retail product markets in Providence and Virginia Beach. It is Verizon's responsibility to produce product market-specific evidence of sufficient facilities-based (*i.e.*, competitive loop-based) competition from carriers providing a "full range of services that are substitutes" for Verizon's wholesale UNE loops and transport and its retail local service offerings.[15] Services that are not actual substitutes for Verizon's wireline local exchange services are not properly included in the Commission's retail market analysis and wholesale inputs that are not actual substitutes for Verzion's UNE loops and transport are not properly included in the Commission's wholesale market analysis. Not surprisingly, Verizon has not produced the required evidence of substitutability.

To the contrary, by limiting its arguments in support of including cut-the-cord wireless lines in the competitive analysis to competition in the retail *residential* product market, Verizon has conceded that wireless services are not substitutes for the wireline services demanded by *business* customers.[16] And with respect to the residential product market,

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13 *Verizon Rhode Island Petition*, at 15; *Verizon Virginia Beach Petition*, at 15.

14 *Verizon 6-MSA Order*, at Appendix B, n. 6, quoting *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-63, Memorandum Opinion and Order, 20 FCC Rcd 13967, 14018 (2005).

15 *See Omaha Forbearance Order*, n. 156.

16 In its petitions and supporting documents, Verizon does not include mobile wireless services as a source of competition in the enterprise market. *See Verizon Rhode Island Petition*, at 26-30; *Verizon Virginia Beach Petition*, at 26-31. Importantly, the Commission did not include mobile wireless services in its competitive analysis in the *Omaha Forbearance Order* or the *ACS Forbearance Order*. *See Omaha Forbearance Order*, ¶ 72; *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended, For Forbearance From Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, 22 FCC Rcd 1958 (2007) ("*ACS Forbearance Order*"), ¶ 29.

Verizon's own data reveals that the overwhelming majority of residential voice customers do not consider mobile wireless services a substitute for landline voice service. Verizon's March 2008 survey found that eighty-three percent of survey respondents intend to keep using their wireline service indefinitely.[17] The overwhelming reasons given for the plan to retain wireline voice service were the reliability and safety of wireline versus wireless service.[18]

The Commission itself recently confirmed that wireless services are not suitable substitutes for wireline services for most households. In discussing the support provided to wireless competitive eligible telecommunications carriers ("ETCs") under the federal universal service fund, the Commission noted that:

> These wireless competitive ETCs do not capture lines from the incumbent LEC to become a customer's sole service provider, except in a small percentage of households. Thus, rather than providing a complete substitute for traditional wireline service, these wireless competitive ETCs largely provide mobile wireless telephony service in addition to a customer's existing wireline service.[19]

This conclusion is a powerful statement that residential consumers today still do not consider wireless services to be a true substitute for wireline voice services. Thus, cut-the-cord wireless lines should be excluded from the Commission's analysis of competitive conditions in all product markets – including the retail residential market – in Providence and Virginia Beach.[20]

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17 News Release, New Survey Shows 83 Percent of Consumers Continue to Rely on Landline Voice Service for its Quality, Safety Features (Mar, 27, 2008), at 1, available at http://newscenter.verizon.com/press-releases/verizon/2008/new-survey-shows-83-percent-of.html.

18 *Id.* ("Ninety-four percent of the respondents cited reliability and 91 percent cited safety as the key factors for retaining landline service.").

19 *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket Nos. 05-337, 96-45, Order (rel. May 1, 2008), ¶ 29.

20 Verizon incorrectly characterizes the Commission's decision in the *Verizon 6-MSA Order*, suggesting that the Commission adopted a methodology that treats non-ILEC affiliated wireless services as being within the same product market as wireline mass market voice services. *See Verizon Rhode Island Petition*, at 10; *Verizon Virginia Beach Petition*, at 10. The *Verizon 6-MSA Order* reached no such conclusion. Rather, the Commission concluded in that order that Verizon had failed to demonstrate the existence of sufficient competition to warrant forbearance "*even including* 'cut the cord' competition." *Verizon 6-MSA Order*, at ¶ 27 (emphasis supplied). This does not

Even if the Commission were to conclude that mobile wireless services are a substitute for the wireline services purchased by retail residential customers – which it should not – it could only include non-ILEC affiliated cut-the-cord wireless lines in its competitive analysis if Verizon had produced "reliable, geographically-specific data regarding the measure of wireless substitution" in the geographic markets in which it is seeking forbearance.[21] As noted by the Commission in the *Qwest 4-MSA Order*, any petitioner seeking to rely on mobile wireless lines to support a grant of forbearance must submit "complete and reliable data that is geographically specific to the areas for which forbearance is sought."[22] Since Verizon has failed to produce any data for Providence or Virginia Beach that fits these requirements, the Commission is compelled to completely exclude mobile wireless lines from its competitive analysis.

c. A separate competitive analysis must be conducted for each product market.

Once appropriate product markets are determined, it is equally critical that the Commission actually conduct a separate analysis for each relevant market. Unfortunately, the Commission failed to do so in the *Omaha Forbearance Order* or the *ACS Forbearance Order*. In those proceedings, the Commission relied on aggregate data regarding cable network coverage although such aggregate data provided no reliable information regarding the cable provider's network coverage for either the retail services purchased by residential customers or the retail services required by business customers.[23] Moreover, the Commission relied on the cable operator's success in the retail residential market as a basis for predicting that it would have similar success in the retail business market.[24]

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constitute a finding that wireless service is in the same product market as wireline service. It is nothing more than a determination that the issue was immaterial to the Commission's conclusions in the order, since even if such lines were included, there still was not sufficient competition to grant forbearance.

21 *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, Memorandum Opinion and Order, 23 FCC Rcd 11884, ¶ 22 (2008) ("*Qwest 4-MSA Order*").

22 *Id.*

23 Nor did it provide any useful information regardless the cable providers' network coverage for the wholesale inputs purchased by competitive carriers to provide service to residential or business customers. *See Omaha Forbearance Order*, ¶ 69; *Anchorage Forbearance Order*, ¶ 21.

24 *See Omaha Forbearance Order*, ¶ 66.

The fusion of the separate product markets in those orders is directly at odds with the Commission's stated objective of determining the extent to which competitors' facilities and services constitute substitutes for the facilities and services for which forbearance is sought.[25] This shortcoming in the Commission's analysis was acknowledged by Commissioners Copps and Adelstein in their joint concurring statement in the *ACS Forbearance Order*. They wrote:

> We concur also because this decision does not adequately address market differentiations, as between residential and business, making it difficult to conclude which market segments are actually receiving the benefit of emerging competitive choice.[26]

The Commission should not make the same mistake in the instant forbearance dockets. The Commission should conduct separate analyses for each product market.[27]

2. Geographic Markets

The signatories maintain that the relevant geographic market for purposes of assessing whether forbearance from Section 251(c)(3) unbundling requirements is warranted is the ILEC's service territory within a Metropolitan Statistical Area ("MSA"). The MSA is the most appropriate geographic market because it most accurately reflects the area in which purchasers of Section 251(c)(3) UNEs demand service. Carriers must be able to purchase UNE loops and transport throughout the geographic area necessary to achieve minimum viable scale, otherwise they will be unable to sustain their presence in the market. The MSA generally reflects the scope of the geographic area necessary to achieve market viability. The Commission previously has recognized the fact that carriers are likely to enter the market on an MSA-level basis. For example, in the *Pricing Flexibility Order*,[28] the Commission rejected RBOC arguments that special access pricing flexibility should be granted on a state-wide basis and instead agreed with commenters that "MSAs best reflect the scope of competitive entry, and

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25 *Omaha Forbearance Order*, ¶ 65.

26 *ACS Forbearance Order*, Statement of Commissioners Michael J. Copps and Jonathan S. Adelstein, Concurring, at 1.

27 Specifically, in applying the Wholesale Test, the wholesale inputs used to provide services to residential customers should be assessed separately from the wholesale inputs used to provide services to business customers. Similarly, when applying the Retail Test, the retail services provided via UNE loops and other wholesale inputs belong in a different product market from the retail services provided via UNE loops and other wholesale inputs to business customers.

28 *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) ("*Pricing Flexibility Order*").

therefore are a logical basis for measuring the extent of competition."[29] The same reasoning was applied by the Commission in determining that carriers provide local number portability on an MSA-by-MSA basis.[30]

B. The Commission Should Assess Wholesale Competition Separately From Retail Competition

Since the Section 251(c)(3) unbundling obligation applies to the wholesale services provided by ILECs, the Commission's analysis necessarily must separately consider the effects that a grant of forbearance would have on consumers of those wholesale services as well as the consumers of retail services offered using those inputs.[31] It is insufficient for the Commission to limit its UNE forbearance analysis to competition in the retail market.

The Commission acknowledged the importance of "significant alternative sources of wholesale inputs" in the *Omaha Forbearance Order*, but concluded that "Qwest's own wholesale offerings will continue to be adequate without unbundled loop and transport offerings."[32] The aftermath of the *Omaha Forbearance Order* has demonstrated the inaccuracy of the Commission's predictive judgment however. McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), a competitor in the Omaha MSA dependent on access to Qwest's last-mile facilities, has petitioned the Commission to reinstate Qwest's Section 251(c)(3) loop and transport unbundling obligations in the Omaha MSA because the Commission's "'predictive judgment' that Qwest would offer wholesale access to dedicated facilities on reasonable terms and conditions once released from the legal mandate of Section 251(c) has proven incorrect."[33] McLeodUSA has been forced to exit the Omaha market as a direct result of Qwest's post-forbearance unwillingness to offer wholesale access to loops and transport at reasonable rates, terms and conditions.

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29 *Pricing Flexibility Order*, ¶ 72.

30 *Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, ¶ 82 (1996).

31 As the Commission correctly noted in the *ACS Forbearance Order*, "[c]ompetition in the retail market can be directly affected by the level of competition and the availability of inputs in an upstream wholesale market." *ACS Forbearance Order*, n. 82.

32 *Omaha Forbearance Order*, ¶ 67 (footnote omitted).

33 *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223 (filed Jul. 23, 2007) ("*McLeodUSA Petition*"), at 1.

Further, in the *Omaha Forbearance Order*, the Commission implicitly assumed that although wholesale market competition did not exist at the time forbearance was sought, a viable wholesale market could develop later. This assumption was incorrect. Wholesale market competition is interdependent on the existence of non-incumbent retail market competitors. The more non-incumbent retail carriers operate in a market, and the more successful they become in generating retail demand, the more likely it is that wholesale offerings will emerge to serve such carriers. A single company (such as a cable company) with facilities in a market over which it provides a retail bundled product is unlikely to evolve into a wholesale carrier unless would-be purchasers remain in the market and continue to grow. This reality was demonstrated in the Omaha MSA. There, eliminating UNEs did not foster the development of alternative offerings by Cox, the cable provider. Instead, it removed potential purchasers such as McLeodUSA from the market, thereby removing any motive for Cox to create such offerings.

Thus, the signatories maintain that the Commission should conduct a separate analysis of wholesale alternatives in each product and geographic market in which an ILEC seeks forbearance from unbundling obligations. Forbearance should not be granted in any product market that does not have meaningful wholesale competition (*i.e.*, at least two facilities-based non-ILEC wireline competitors in the wholesale loop market that each have deployed end-user connections to 75% of end user locations, and such wholesale suppliers individually have captured at least 15% wholesale loop market share)[34] unless, as described below, the Commission finds that meaningful retail competition (*i.e.*, at least 75% of end user locations are served by two or more facilities-based non-ILEC wireline competitors that offer retail service in the relevant product market to the locations in question via loops that the competitors have actually deployed, and there are at least two facilities-based non-ILEC competitors that each have captured at least 15% retail market share) exists in a particular product market.

C. A Single-Facilities Based Competitor To The ILEC Is Not Sufficient To Ensure Against Unjust And Unreasonable Charges And Practices Or Unreasonable Discrimination

As Commissioners Copps and Adelstein have consistently reminded the Commission since the *Omaha Forbearance Order*, "the statute contemplates more than just competition between a wireline and cable provider."[35] As noted by Commissioner Copps in the *Verizon 6-MSA Order*, "the Telecom Act envisioned more than just a cable-telephone duopoly as

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34 Such facilities-based non-ILEC wireline competitors must also have deployed wholesale operations support systems sufficient to support wholesale demand in the relevant product market.

35 *Omaha Forbearance Order*, Concurring Statement of Commissioners Michael J. Copps and Jonathan S. Adelstein, at 1.

sufficient competition in the marketplace."[36] Commissioners Copps and Adelstein are properly troubled by a forbearance analysis that is accepting of duopoly as a competitive marketplace, since a single facilities-based competitor to the ILEC is not sufficient to protect against the risks of tacit collusion that would necessarily lead to restricted service choices and higher prices for consumers.

The Commission has repeatedly expressed concerns in other contexts about the anticompetitive consequences of duopolies. In the *UNE Remand Order*, for example, the Commission concluded that an ILEC/cable duopoly does not constitute sufficient competition to realize the local market-opening goals of the Telecom Act. The Commission noted:

> We believe that Congress rejected implicitly the argument that the presence of a single competitor, alone, should be dispositive of whether a competitive LEC would be "impaired" within the meaning of section 251(d)(2). For example, although Congress fully expected cable companies to enter the local exchange market using their own facilities, including self-provisioned loops, Congress still contemplated that incumbent LECs would be required to offer unbundled loops to requesting carriers.[37]

The Commission went on to state that a standard that would be satisfied by the existence of a single competitor "would not create competition among multiple providers of local service that would drive down prices to competitive levels" and that "such a standard would more likely create stagnant duopolies comprised of the incumbent LEC and the first new entrant in a particular market."[38] Similarly, in reviewing proposed mergers among competing satellite television providers, the Commission recognized that a merger resulting in duopoly "create[s] a strong presumption of significant anticompetitive effects."[39]

In the *Omaha Forbearance Order*, the Commission dismissed concerns that forbearing from application of unbundling requirements to Qwest would result in a cable/ILEC duopoly on the ground that "the actual and potential competition from established competitors

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36 *Verizon 6-MSA Order*, Concurring Statement of Commissioner Michael J. Copps, at 1.

37 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696, 3726 (1999) ("*UNE Remand Order*").

38 *Id.*

39 *In the Matter of Application of EchoStar Communications Corporation*, Hearing Designation Order, 17 FCC Rcd 20559, 20605 (2002).

which can rely on the wholesale access rights and other rights they have under sections 251(c) and 271 from which we do not forbear, minimizes the risk of duopoly and of coordinated behavior or other anticompetitive conduct" in the Omaha MSA.[40] The Commission predicted that in the absence of a Section 251(c)(3) unbundling obligation, Qwest would have the incentive to make attractive wholesale offerings available to competitors that do not have their own last-mile facilities, thereby avoiding the development of a Qwest/Cox duopoly.[41]

As noted above, however, McLeodUSA was forced to withdraw from the Omaha MSA because the Commission's predictive judgment that Qwest would offer wholesale access to dedicated facilities at reasonable rates, terms and conditions turned out to be incorrect. In its petition seeking reinstatement of Qwest's Section 251(c)(3) unbundling obligation in the Omaha MSA, McLeodUSA detailed its repeated good faith attempts to negotiate replacement wholesale arrangements with Qwest and Qwest's consistent refusal to negotiate wholesale pricing for voice-grade, DS1, and DS3 loops and transport for the nine affected wire centers.[42] McLeodUSA pointed out that Qwest's refusal to negotiate wholesale rates following the grant of forbearance not only defies the Commission's predictive judgment regarding Qwest's behavior once Section 251(c)(3) obligations were lifted, but it also violates Qwest's obligation under Section 271(c)(2)(B) to provide unbundled access to local loops and transport at just and reasonable rates.[43]

At the same time, Cox has not entered the wholesale market in the Omaha MSA, offering a meaningful wholesale loop and/or transport product to McLeodUSA and other competitive carriers. In the face of the post-forbearance market behavior of the only two carriers with last-mile facilities in the nine Omaha wire centers where Qwest was granted unbundling forbearance, McLeodUSA was forced to exit the Omaha MSA. The lesson learned from Omaha is that if the ILEC and a single competitor control the only last-mile facilities available to reach customers in a particular geographic area, a wholesale market will not develop, and the retail market behavior of the two facilities-based carriers will be unconstrained by competitive pressures.

Thus, the undersigned carriers maintain that an ILEC seeking forbearance from Section 251(c)(3) unbundling obligations must show that at least two wireline competitive carriers (*i.e.*, non-ILECs) meet the minimum facilities-coverage requirement and that those competitors, using their own facilities (including their own loops), are successfully providing a

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40 *Omaha Forbearance Order*, ¶ 71.

41 *Id.*, ¶ 67.

42 *McLeodUSA Petition*, at 4.

43 *McLeodUSA Petition*, at 10.

full range of services that are substitutes for the ILEC's offerings in each relevant product market.

D. The Nature and Extent Of Both Actual And Potential Competition Must Be Assessed When Considering Whether Forbearance From UNE Obligations Is Warranted

The Commission's Section 251(c)(3) forbearance analysis must include an assessment of both potential competition (*i.e.*, competitors' ability to reach customers with their own last-mile facilities and to provide service using those facilities) and actual competition (*i.e.*, the market penetration achieved by competitors). Only competitors that are capable of providing service using their own last-mile facilities are properly included in this competitive analysis. This is how the Commission has consistently defined a facilities-based competitor in prior Section 251(c)(3) forbearance proceedings. In the *Omaha Forbearance Order*, the Commission specified that Section 251(c)(3) forbearance is warranted only in locations where competitors are offering service via their own extensive last-mile facilities, finding that granting forbearance "where no competitive carrier has constructed substantial competing 'last mile' facilities is not consistent with the public interest and likely would lead to a substantial reduction in [ ] retail competition."[44] Likewise, in the *Anchorage Forbearance Order*, the Commission tailored ACS's relief to those locations where it found that cable provider GCI could use its own network, including its own loop facilities, to provide within a commercially reasonable period of time services that are substitutes for ACS's service offerings.[45]

1. The Commission must assess potential competition by facilities-based carriers in each relevant product market.

The starting point for the Commission's analysis of competitive conditions within each relevant product market under the standard proposed herein is whether multiple facilities-based competitors have deployed competing last-mile loop facilities to 75% of the end user locations within the MSA.[46] The Commission has determined that such facilities "coverage" is the minimum needed to ensure that "significant competition from competitors that do not rely heavily on [the ILEC's] wholesale services" is present before forbearance is granted.[47] This potential competition requirement has been applied by the Commission in each Section 251(c)(3) forbearance proceeding since the *Omaha Forbearance Order* and the undersigned carriers

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44 *Omaha Forbearance Order*, ¶ 60.

45 *ACS Forbearance Order*, ¶ 32.

46 *See Omaha Forbearance Order*, n. 156, ¶ 69.

47 *Omaha Forbearance Order*, ¶ 60.

maintain that it should continue to serve as an important – but not exclusive – component of the Commission's competitive analysis.[48]

2. The Commission must assess actual competition by facilities-based carriers in each relevant product market.

Contrary to the ILECs' desires, however, the Commission's competitive analysis does not begin and end with a showing that the threshold percentage of coverage by competitive last-mile facilities has been reached in a particular product market.[49] The Commission also must determine whether sufficient actual competition exists in each product market.

The Commission has long recognized the importance of market share evidence in conducting its forbearance analyses. In its November 1999 order denying a US West petition seeking forbearance from dominant carrier regulation in the provision of certain special access services in the Phoenix MSA, the Commission stated: "Although we have found that market share should not be the '*sole* determining factor of whether a firm possesses market power,' such information certainly is significant to a determination of whether a carrier has market power."[50]

The Commission's decision to grant Qwest and ACS partial forbearance from Section 251(c)(3) loop and transport unbundling obligations in the Omaha and Anchorage markets, respectively, was grounded in large part on the significant retail residential market share the incumbent cable provider in each market had achieved.[51] In both markets, at the time forbearance was granted, the cable company and the ILEC held roughly equal market positions.[52]

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48 *See ACS Forbearance Order*, ¶ 21; *Verizon 6-MSA Order*, ¶ 36 ("[W]e note that the evidence does show that cable operators have deployed facilities that meet the 75 percent coverage threshold in some wire centers."); *Qwest 4-MSA Order*, ¶ 35 ("[W]e note that the evidence does show that cable operators have deployed facilities that meet the 75 percent coverage threshold in some wire centers.").

49 *See, e.g., Verizon Rhode Island Petition*, at 5 ("In both Omaha and Anchorage, the dispositive factor in granting forbearance from unbundling obligations was the extent to which cable voice services were available. In both cases, the Commission adopted a 'coverage threshold test' that provided relief in every wire center in which cable voice services could be made available to 75 percent of homes in the wire center within a commercially reasonable time.") (emphasis omitted).

50 *Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Memorandum Opinion and Order, 14 FCC Rcd 19947, 19962 (1999) (emphasis in original, footnote omitted).

51 The signatories take issue with the Commission's failure in the *Omaha Forbearance Order* and the *ACS Forbearance Order* to separately assess competitive retail market penetration in the business market.

52 *See Omaha Forbearance Order*, ¶ 66; *ACS Forbearance Order*, ¶ 28.

More recently, the Commission denied Verizon and Qwest forbearance from Section 251(c)(3) unbundling obligations in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach MSAs (Verizon) and the Denver, Minneapolis-St. Paul, Phoenix and Seattle MSAs (Qwest) based in part on the determination that sufficient actual facilities-based competition did not exist in those markets.[53] As the Commission stated in the *Verizon 6-MSA Order*, "we reject Verizon's suggestion that, in prior orders, the Commission granted forbearance based simply on cable coverage ... Rather, the '[m]ost important[] factor in the Commission's analysis in the *Qwest Omaha Forbearance Order* was evidence of 'successful' facilities-based competition ... In measuring such success, the Commission did not look solely at facilities coverage."[54]

The undersigned carriers propose that the Commission adopt an actual competition threshold of 15% market share by individual wireline facilities-based competitors in each relevant product market. Assuming the Commission requires at least two wireline facilities-based competitors to the ILEC (which it should), and the coverage threshold is met,[55] the Commission reasonably may conclude that "successful" facilities-based competition exists in the relevant product market if the facilities-based competitors each individually have achieved at least 15% market share.[56]

E. Verizon Fails To Satisfy The Forbearance Framework Proposed Herein

As explained above, the Commission should adopt a standard for determining whether it is appropriate to grant forbearance from Section 251(c)(3) unbundling obligations that takes into account actual and potential competition from multiple wireline facilities-based (*i.e.*, competitive loop-based) carriers and the Commission should apply that standard separately in each relevant product market. Application of that standard to the records in the instant dockets shows that UNE forbearance is not warranted in any product market in either the state of Rhode Island or the Cox service territory in the Virginia Beach MSA.

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53 *Verizon 6-MSA Order*, ¶ 36; *Qwest 4-MSA Order*, ¶ 35.

54 *Verizon 6-MSA Order*, n. 113 (citations omitted).

55 Each wireline facilities-based competitor has actually deployed end-user connections to at least 75% of end user locations under the Wholesale Test, or 75% of end user locations are served by those wireline facilities-based competitors that offer retail service via self-provided loops to the locations in question under the Retail Test.

56 Of course, the market data used to determine whether the 15% share threshold has been reached must be impartial, reliable, and subject to review and analysis by all interested parties.

Verizon has failed to produce evidence in either docket that multiple wireline facilities-based competitors in either the retail residential or retail business market have actually deployed loops to at least 75% of end user locations in the geographic market and that those wireline competitors are offering retail services to the locations in question via the loops they have actually deployed, nor has Verizon shown that at least two wireline facilities-based competitors individually have captured at least 15% retail residential or business market share. Separately, Verizon has failed to show the existence of at least two facilities-based wireline competitors in the wholesale loop market, each of which has actually deployed end user connections to at least 75% of end user locations, and who individually have captured at least 15% wholesale market share in the relevant product market. Verizon's failure to meet either component of this standard dictates that its petitions seeking UNE forbearance should be denied in their entirety.

II. VERIZON FAILS TO SATISFY THE UNE FORBEARANCE STANDARD DEVELOPED AND APPLIED IN PREVIOUS FORBEARANCE ORDERS

Should the Commission decide to employ the forbearance standard used in previous UNE forbearance orders rather than adopt the framework proposed in Section I that more specifically tracks the congressional intent embodied in Section 10 of the Act, however, Verizon's petitions still must be denied.

The starting point for the Commission's analysis under the standard established in the *Omaha Forbearance Order* and applied in subsequent orders addressing forbearance from Section 251(c)(3) unbundling obligations, including the *Verizon 6-MSA Order*, requires the party petitioning for forbearance to show that competitive carriers have constructed competing last-mile facilities and that each of these competitive carriers is willing and able to use its facilities, including its own local loop facilities, within a commercially reasonable period of time to provide a full range of services that are substitutes for the ILEC's local service offerings to 75% of the end user locations accessible from a wire center.[57] The Commission determined that such coverage is the minimum needed to ensure that "significant competition from competitors that do not rely heavily on [the ILEC's] wholesale services" is present before forbearance is granted.[58] Verizon has failed to fulfill this threshold requirement in either the Rhode Island or Providence market.

Verizon's principal basis for the contention that this requirement has been fulfilled is the presence of cable provider Cox in Rhode Island and Virginia Beach. Verizon has

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57 *See Omaha Forbearance Order*, n. 156, ¶ 69.

58 *Id.*, ¶ 60. As discussed herein, this showing of competitive facilities coverage is a necessary, but not a sufficient, precondition for granting Section 251(c)(3) forbearance.

not provided sufficient information, however, to fully assess Cox's last-mile facilities coverage in either the mass market or the enterprise market in Rhode Island or Virginia Beach.[59] Verizon has not shown that Cox's last-mile facilities can be used to provide a full range of substitutable services to the requisite percentage of end user locations in each product and geographic market within a commercially reasonable period of time. Moreover, the limited cable facilities data Verizon has produced was filed with its petitions and is now more than a year old. Verizon has chosen not to update or supplement that data at any time since it was submitted.[60]

Within the enterprise market, Verizon also attempts to justify forbearance on the purported existence of the "extensive competitive facilities-based networks" deployed by non-cable competitors.[61] Verizon's "proof" consists of figures purporting to represent the number of competitive fiber networks in Rhode Island and the Virginia Beach MSA.[62] There are numerous fundamental problems with Verizon's competitive fiber route data however. Verizon does not identify the fiber operators it claims are operating each route and it does not present the fiber route data on a sufficiently granular basis to provide meaningful input. Most importantly, Verizon does not meet the requirement that it identify which, if any, of these fiber networks reach, and can support the offering of a full range of substitutable services within a commercially reasonable period of time, to individual customer locations. As pointed out by numerous parties in their initial comments, Verizon fails to acknowledge that merely passing a customer location does not necessarily enable the owner of competitive fiber to provide service at that customer location.[63] Further, Verizon fails to identify whether (and to what extent) the competitive fiber

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59 In the *Omaha Forbearance Order* and in subsequent UNE forbearance orders, the Commission has employed the mass market and the enterprise market as the appropriate product markets for its competitive analysis. *See, e.g., Omaha Forbearance Order*, ¶ 22. As discussed in Section I, *supra*, the signatories maintain that the Commission instead should assess competitive activity in the residential and business product markets rather than the mass market and the enterprise market.

60 Verizon's petition for the state of Rhode Island was submitted February 14, 2008 and its petition for the Cox service territory within the Virginia Beach MSA was submitted March 31, 2008. Indeed, Verizon has not submitted any updates or supplements to its petitions or accompanying data in either docket since July 2008.

61 *Verizon Rhode Island Petition,* at 26; *Verizon Virginia Beach Petition*, at 27.

62 According to the data cited by Verizon, excluding Cox and AT&T, there are "four known competing providers that operate fiber networks" in the Rhode Island market. *Verizon Rhode Island Petition*, at 27. Verizon contends that, excluding Cox and AT&T, there are "two known competing providers that operate fiber networks" in the Virginia Beach MSA. *Verizon Virginia Beach Petition*, at 27.

63 *See, e.g.,* Comments of Covad Communications Group, *et al.*, WC Docket No. 08-24 (filed Mar. 28, 2008), at 47; Comments of NuVox Communications and XO Communications, LLC, WC Docket No. 08-49 (filed May 13, 2008), at 46.

on its route maps is being used to provide telecommunications services and also fails to differentiate between fiber transport and fiber being used to provide local exchange access. In the absence of this detail, there is no way to verify Verizon's representations or substantiate its claims.

Reliable data on the extent of local loop-based competition by alternative fiber providers does exist however. GeoResults is a neutral source for this type of information.[64] The undersigned carriers have obtained GeoResults data for all rate centers in Rhode Island. These data identify all commercial buildings in the relevant rate centers, all buildings where competitors are serving customers using their own facilities (*i.e.*, CLEC Lit Commercial Buildings), the overall user demand in each wire center and, most importantly, the amount of that demand that competitors can serve using their own facilities. These data, which have been placed in the record, show that extremely few commercial locations are served by competitors using their own facilities.[65] Moreover, CLECs' addressable demand share in these locations (*i.e.*, the percentage of total demand in each wire center (measured on a DS0 basis) that facilities-based CLECs have the potential to serve)[66] is below 10% in 23 of the 24 rate centers at issue in Rhode Island the CLECs' maximum share is 12.87%.[67] Thus, the GeoResults data indicate that insufficient facilities-based competition exists in Rhode Island today to warrant forbearance.

Under the current UNE forbearance standard, in addition to competitive last-mile facilities coverage ("*i.e.*, potential competition), the Commission considers whether sufficient actual facilities-based competition exists in each relevant market to warrant forbearance. Verizon also fails to meet this aspect of the Commission's standard in either Rhode Island or Virginia Beach. Verizon relies almost exclusively on competition from cable provider Cox to allege that the actual competition requirement has been satisfied in Rhode Island and Virginia Beach.[68] Yet Cox has clearly and unequivocally informed the Commission that Verizon has

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64 GeoResults data is routinely used throughout the industry and has been endorsed by the Commission as a reliable source. *See Verizon 6-MSA Order*, n. 135.

65 Reply Comments of Covad Communications Group, *et al.*, WC Docket No. 08-24 (filed May 12, 2008) ("*Covad, et al. Reply Comments*"), at 12-13.

66 A CLEC is considered to have the potential to serve the total demand in any commercial building to which it has facilities even if it may not have the rights to access all customers.

67 *Covad, et al. Reply Comments*, at 14-15.

68 *Verizon Rhode Island Petition*, at 21-25; *Verizon Virginia Beach Petition*, at 5-8, 21-26.

grossly overstated cable competition in the voice market and that forbearance from Section 251(c)(3) is not justified.[69]

Verizon attempts to obfuscate the fact that insufficient actual facilities-based competition exists in the two geographic markets at issue by urging the Commission to include cut-the-cord wireless, over-the-top VoIP, and Wholesale Advantage and resold lines in its analysis. Verizon also urges the Commission to consider Verizon's switched access line losses and the extent to which competitors are using Verizon special access services. None of these arguments are of any value.

First, Verizon's claim that cut-the-cord wireless data should be included in the Commission's competitive analysis should be rejected for all of the reasons specified in Section I.A, *supra*. There is significant justification for not including wireless service in the competitive analysis for any product market on the ground that the overwhelming majority of consumers – including residential subscribers – do not consider wireless services to be substitutes for wireline voice service. Second, Verizon urges the Commission to include over-the-top VoIP competition in its analysis notwithstanding the fact that the Commission in the *Verizon 6-MSA Order* excluded it on the ground that "there is no data in the record that justify finding that these providers offer close substitute services."[70] Verizon contends that the Commission should reverse itself because "there are more than 20 'over-the-top' VoIP providers that currently offer services with features comparable to Verizon's wireline telephone service ..."[71] Yet, as pointed out by a number of commenters, Verizon filed nearly the exact same data and made the exact same arguments using the exact same language in its petitions filed in the 6-MSA proceeding.[72] Thus, Verizon's arguments in the instant dockets should be disregarded as an improper attempt at reconsideration of the *Verizon 6-MSA Order*. Finally, Verizon contends that Wholesale Advantage and resold lines should be included in the competitive analysis notwithstanding the fact that these competitive lines are not facilities-based. The Commission has held time and again that only facilities-based (*i.e.*, competitive loop-based) competition is properly included in

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69 Comments of Cox Communications, Inc., WC Docket No. 08-24 (filed Mar. 28, 2008), at 1-3 ("While Cox has enjoyed success in Rhode Island, Cox does not duplicate Verizon's ubiquitous network. Moreover, Cox's enterprise market facilities deployment and penetration do not match Verizon's. Indeed, Verizon remains the dominant telephone provider in Rhode Island, with the majority of retail customers and a commanding share of the enterprise market."); Comments of Cox Communications, Inc., WC Docket No. 08-49 (filed May 13, 2008), at 4-10.

70 *Verizon 6-MSA Order*, ¶ 23.

71 *Verizon Rhode Island Petition*, at 16. *See also Verizon Virginia Beach Petition*, at 16-17.

72 *See, e.g.,* Opposition of One Communications Corp., *et al.*, WC Docket No. 08-24 (filed Mar. 28, 2008), at 27; Reply Comments of Covad Communications Group, *et al.*, WC Docket No. 08-24 (filed May 12, 2008), at 11.

its Section 251(c)(3) forbearance analysis.[73] Consequently, there is no basis for including Wholesale Advantage and resold lines – both of which utilize Verizon's local loop and transport facilities – in the Commission's competitive analysis.

Verizon seeks Commission consideration of purported decreases in its retail residential switched access lines and its business lines, contending that these line losses provide an "independent basis to determine ... that the requested forbearance is appropriate."[74] In previous forbearance orders, however, the Commission has rejected attempts to demonstrate that markets are competitive based on calculating percentage reductions in ILEC retail lines.[75] The Commission has done so based on its assessment that line losses may be caused by a great many factors and provide no indication as to whether the ILEC faces sufficient competition in the particular market at issue. The Commission also repeatedly has rejected attempts to include competition provided by use of an ILEC's special access facilities in its competitive analysis.[76] Verizon has provided no evidence or legal basis for the Commission to deviate from these well-established precedents. Thus, the Commission should disregard purported Verizon line loss and special access data in conducting its forbearance analysis.

When all record evidence is considered, it is clear that Verizon has not shown that it meets either the potential or actual competition requirements of the current Section 251(c)(3) forbearance test in any product market in either Providence or Virginia Beach. Thus, should the Commission choose to apply the UNE forbearance standard used in previous Section 251(c)(3) forbearance dockets, it has no choice but to deny the forbearance sought in both geographic markets.

III. VERIZON'S PETITIONS SHOULD BE DISMISSED BECAUSE VERIZON IMPROPERLY SEEKS A DIFFERENT OUTCOME ON THE BASIS OF THE SAME FACTS BEFORE THE COMMISSION IN THE 6-MSA PROCEEDING

In the instant dockets, Verizon is seeking forbearance from the identical rules and statutory provisions within a subset of the geographic area for which it sought forbearance in previous petitions. Those petitions were soundly rejected by the Commission.[77] Verizon

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73 *See, e.g., Omaha Forbearance Order*, ¶ 64.

74 *Verizon Rhode Island Petition*, at 17; *Verizon Virginia Beach Petition*, at 17.

75 *See, e.g., ACS Forbearance Order*, n. 88; *Verizon 6-MSA Order*, ¶ 39.

76 *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket Nos. 04-313, 01-338, Order on Remand, 20 FCC Rcd 2533, ¶ 46 (2005), *affirmed, Covad Communications v. FCC*, 450 F.3d 528 (D.C. Cir. 2006). *See also Verizon 6-MSA Order*, ¶ 42.

77 *See Verizon 6-MSA Order.*

contends, however, that the forbearance standard applied in the *Verizon 6-MSA Order* "unquestionably is satisfied" in Rhode Island[78] and in the Cox service territory in the Virginia Beach MSA.[79] What Verizon fails to acknowledge is that the competitive data upon which it relies in the instant dockets was before the Commission in the prior proceeding. Verizon has merely repackaged that data in an effort to gain another bite at the apple.

Verizon highlights the competitive inroads cable telephony provider Cox purportedly has made in the residential and enterprise markets.[80] Yet Verizon fails to admit that the record in the prior proceeding – where its forbearance requests were denied – contained substantially identical data regarding Cox's penetration in the same geographic areas. Indeed, in addition to the Cox market penetration data submitted by Verizon midway through that docket, Cox itself submitted more reliable, up-to-date market penetration data just weeks before the Commission's decision in December 2007.[81] The Commission relied in large part on that data in concluding that "competition from cable operators . . . does not present a sufficient basis for relief."[82] The same conclusion holds true for the remainder of the information Verizon would have the Commission consider in the instant petition. The data regarding cut-the-cord wireless and CLEC competition is, at best, a few months more recent than the data before the Commission in the *Verizon 6-MSA* docket. Indeed, just four days before Commission adoption of the *Verizon 6-MSA Order*, Verizon provided the Commission with Rhode Island-specific charts containing up-to-date data purporting to show mass market cut-the-cord wireless, traditional CLEC, and cable telephony penetration in the state.[83]

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78 *Verizon Rhode Island Petition*, at 11.

79 *Verizon Virginia Beach Petition*, at 10.

80 *Verizon Rhode Island Petition,* at 1 ("Cox has been competing aggressively in Rhode Island for all types of customers and has achieved significant success."); *Verizon Virginia Beach Petition*, at 2 ("Cox has been competing aggressively in Virginia Beach for all types of customers and has achieved significant success.").

81 *See* Letter from J.G. Harrington, Counsel to Cox Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Oct. 30, 2007) ("*Cox Data Ex Parte*").

82 *Verizon 6-MSA Order*, at ¶¶ 23, 27, 37. At most, the cable penetration data filed by Verizon with its Rhode Island and Virginia Beach petitions is only several months more recent than the Cox-provided data submitted to the Commission for consideration in the *Verizon 6-MSA Proceeding.*

83 *See* Confidential Attachment A to Letter from Evan T. Leo, Counsel to Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Dec. 3, 2007).

Verizon likely will contend that the data before the Commission in the *Verizon 6-MSA* proceeding was for different geographic markets than the markets for which it is seeking relief in the instant proceedings (*i.e.,* Providence MSA vs. state of Rhode Island; Virginia Beach MSA vs. Cox service territory in the Virginia Beach MSA). That contention is unavailing. The cable penetration data for the Providence MSA produced by both Cox and Verizon *included data specific to Rhode Island.* Moreover, the cut-the-cord wireless, CLEC, and cable penetration charts filed by Verizon mere days before adoption of the *Verizon 6-MSA Order were specific to Rhode Island.* Every access line in Rhode Island alone was included in previously-filed data. By providing not merely Providence MSA-wide data but Rhode Island-specific data as well, Verizon was effectively directing the Commission to focus its forbearance analysis on Rhode Island. Moreover, the cable penetration data for the Virginia Beach MSA produced in the *Verizon 6-MSA* proceeding by both Cox and Verizon *included data for the entire geographic area encompassed in the instant petition.* Every access line in the Cox service territory in the Virginia Beach MSA was included in previously-filed data. Indeed, by Verizon's own admission, the geographic market in which it is currently seeking forbearance represents over 90 percent of the population of the geographic market (*i.e.*, Virginia Beach MSA) for which it sought forbearance in the previous proceeding. In effect, Verizon is seeking to force the Commission – and the industry – to conduct two new costly and resource-intensive forbearance proceedings to address the same information that was found insufficient in the prior proceeding.

Verizon struggles to make the case that its current petitions are more than just replicas of its previous petitions by in effect asking the Commission to interpret the same facts in a different way. For example, Verizon urges the Commission to "attribute[] Verizon Wireless customers who have cut the cord to the competitive side of the ledger, rather than treating them as equivalent to a Verizon wireline customer."[84] Similarly, Verizon seeks a new interpretation of the same facts through the use of rate centers (rather than the established use of wire centers) [85] and carrier white pages listings[86] as the basis by which to analyze competitive activity. The Commission should not be taken in by this attempt to dress up the same facts to gain another chance at forbearance through nothing more than an untimely and unlawful request for reconsideration. Instead, the Commission should send a clear signal that it will not countenance manipulation of Section 10 and its procedures in this manner by dismissing or summarily denying Verizon's petitions.

There is considerable precedent for Commission rejection of Verizon's petitions on the ground that the factual issues Verizon raises are duplicative of issues that have already

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84 *Verizon Rhode Island Petition*, at 14. *See also Verizon Virginia Beach Petition*, at 14.

85 *Verizon Rhode Island Petition,* at n. 7; *Verizon Virginia Beach Petition*, at n. 7.

86 *Verizon Rhode Island Petition* at 11-12; *Verizon Virginia Beach Petition*, at 11-12.

been litigated in a previous Commission proceeding.[87] Indeed, the Commission and the courts have long held that issue preclusion applies to prevent agency re-litigation of factual disputes.[88] For example, in its VHF frequency assignment proceeding, the Commission precluded parties from raising new objections based on interference issues stating, "Unless a party were to come forward with some *newly discovered evidence which for good reason was not available at the time* of the allotment proceeding or otherwise demonstrate good cause, we do not contemplate that 'gain' versus 'loss' issues will be considered again in an assignment proceeding to determine if an application for the allotment should be granted."[89] The doctrine of issue preclusion is triggered when only questions of fact are at stake. Such preclusion serves the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving agency resources.[90]

For the doctrine of issue preclusion to apply, four elements generally must be present: (1) there must be an issue essential to the prior decision and identical to the one previously litigated; (2) the prior decision must have become a final judgment on the merits; (3) the barred party must have been a party to the prior litigation; and (4) the barred party had to have had a full and fair opportunity to litigate the issue in the earlier proceeding.[91] In this case,

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87 *See, e.g., Petition for Relief of Fal-Comm Communications, Petition vs. Continental Cablevision of Michigan, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 13319; n.1 (1997) ("Fal-Comm filed this second petition . . . which is duplicative of CSR-4874-L, seeking the same relief for the same issues against Continental Cablevision of Michigan, Inc. Accordingly, this second petition will be dismissed."); *Petition of Budd Broadcasting Company, Inc. for Modification of Market Station WGFL(TV)*, Memorandum Opinion and Order, 14 FCC Rcd 4366, ¶ 3 (1999) ("The principles of *res judicata* and collateral estoppel may be applied to prevent agency litigation of factual disputes."). *See also Auction 65 Public Notice Regarding Long Form/FCC Form 601 Applications Accepted for Filing*, 21 FCC Rcd 13010 (2006).

88 *See United States v. Utah Construction and Mining*, 384 U. S. 394, 422 (1966) ("When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.") The FCC's use of issue preclusion in licensing adjudications has been upheld in *Gordon County Broadcasting Co. v. FCC*, 446 F.2d 1335, 1338 (D.C. Cir. 1971).

89 *In re Table of Television Channel Allotments*, Notice of Proposed Rulemaking, 833 FCC 2d 51, n.76 (1980) (emphasis added).

90 *See Univ. of Tenn. v. Elliott*, 478 U.S. 788, 798 (1986) (citing *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

91 *See in re Petition of: Budd Broadcasting Company, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 4366, ¶ 3 (1999); *In re Applications of Montgomery Media Network, Inc.,* Memorandum Opinion and Order, 4 FCC Rcd 3749, ¶ 4 (1989).

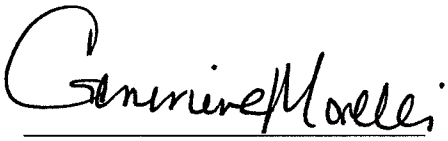
all four prongs have been met: (1) the issue of Verizon's eligibility for forbearance from dominant carrier, *Computer Inquiry*, and Section 251(c)(3) unbundling rules is presented in both the previous proceeding and in the instant dockets and is sought in the instant dockets based on the same underlying factual assertions as in the prior case; (2) the *Verizon 6-MSA Order* is a final decision on the merits; (3) Verizon was a party to the *Verizon 6-MSA Proceeding*; and (4) Verizon had a full and fair opportunity to present all of the arguments it makes in the Rhode Island and Virginia Beach petitions in the prior forbearance docket. On this basis, therefore, the Commission should reject or summarily deny Verizon's petitions.

IV. CONCLUSION

For all of the foregoing reasons, Verizon's petitions seeking forbearance from UNE obligations in the state of Rhode Island and the Cox service territory in the Virginia Beach MSA should be denied in their entirety.

Respectfully submitted,

Broadview Networks, Inc., Covad Communications Company, NuVox, and XO Communications, LLC



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